United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2075

To be argued by
JOSEPH W. HENNEBERRY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-2075

DAVID MITCHELL,

Petitioner-Appellant,

-against-

J.E. LaVALLEE, Superintendent, Clinton Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

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Questions Presented

1. Has the appellant exhausted his state remedies?

2. Has the appellant met his burden of proof that he did not deliberately withhold this inadequacy of counsel's argument in a prior federal habeas corpus proceeding?

3. Does the alleged failure of counsel to bring in a person whose name appears in testimony on the chance that such person's recollection might differ in some respect from one of the complainants constitute inadequacy of counsel where the record establishes as found by the district judge that such counsel was otherwise fully competent, diligent and dedicated?

Statement

This is an appeal from orders of the United States District Court for the Southern District of New York (Stewart, J.) dated June 23, 1976 denying appellant's application for a writ of habeas corpus after a hearing and July 16, 1976 denying motion for reargument. The District Court granted a certificate of probable cause to appeal to this Court.

Statement of Facts

David Mitchell was convicted after trial by jury in the Supreme Court, New York County (Postel, J.) of the crimes of Robbery in the First Degree (2 counts), Grand Larceny in the Third Degree (2 counts), Burglary in the Second Degree (2 counts), Criminal Trespass in the First Degree and Possession of a Dangerous Weapon. On November 26, 1969, appellant was sentenced to imprisonment for a term of eight years and four months to twenty-five years on each robbery conviction, one year and four months to four years

on the grand larceny convictions, a term not to exceed seven years on the burglary convictions, one year on the weapon conviction and one year on the criminal trespass conviction, the robbery sentences to run consecutively and the other sentences to run concurrently with the robbery sentences. The aggregate sentence is eight years and four months to fifty years.

A. The Suppression Hearing

On October 15, 1969, a Wade Hearing was conducted prior to trial and the Court (Murtagh, J.) found that there was no taint to the in-court identification of the appellant and that the police procedures involved were proper (W 124-9).*

Mary Douglas testified that on July 8, 1968, the appellant forced his way into her apartment at 2 Horatio Street. The appellant had a knife. He stayed in the apartment approximately 25 minutes (W 91-3, 105). The lighting conditions in the apartment were excellent, Douglas had her eyes open almost continuously and heard the appellant's voice (W 93-4). At this hearing, Mary Douglas positively identified the appellant (W 105).

* Letter W followed by number refers to the minutes of the Wade Hearing.

When the appellant left the apartment, Douglas telephoned the police and described the appellant to them including in the description a scar on his face (W 94-5). One week later she saw the appellant Mitchell again standing outside her apartment building. She talked with Mitchell and recognized his West Indian accent. Miss Douglas reported this incident to the police (W 95-6).

Katherine Bertram testified that on July 9, 1968, the appellant entered the elevator of her apartment building with her, pulled a knife and forced Miss Bertram to let him into her apartment. He remained there approximately ten minutes committing crimes against her person. Miss Bertram notified the police after the incident. She was with Mitchell totally about fifteen minutes and had a clear view of his face during this entire time. Both the elevator and apartment were well lighted. Miss Bertram positively identified the appellant Mitchell at the hearing (W 50-2, 68-9, 114-15).

About one-half hour after the attack Miss Bertram gave a description of Mitchell to a Detective Bradford including a scar on his face (W 52) and a gold ring with three diamonds on his wedding ring finger (W 52-3, 64-5).

The Court noted that the appellant was wearing a ring of this description at the hearing (W 63).

Several days after the crimes, a Detective Zollo showed Miss Douglas and Miss Bertram hundreds of photos from the "rape file" but they did not recognize their attacker among them (W 25-6, 32, 53-4, 67-72, 96).

A Detective Mohan arrested the appellant Mitchell on July 22, 1968 (W 2-3). Subsequently he accompanied Detective Zollo to Miss Douglas' apartment. There Miss Douglas was shown eight mug shots and picked out the photograph of the appellant (W 3-4; 16-17, 26-8, 30, 97-8, 105). Detective Zollo then showed Miss Douglas a "stand-up" photograph of the appellant, and she positively identified him as her attacher (W 4-5, 29, 31-2).

Then Detective Zollo went to Miss Bertram's apartment with the eight mug shots, but not the "stand-up" photograph. Miss Bertram picked the appellant's picture from the eight (W 32-3, 54, 71-3, 84). She believed, however, that Zollo also showed her a "full length photo" (W 84-5).

On July 29, 1968, Detective Mohan was in the Criminal Court Building for a hearing on the complaint of Laura Gleason against appellant Mitchell. After the hearing, which Douglas and Bertram did not attend, Mohan placed Mitchell in a detention cell and awaited his case to be called again (W 6-9, 19-20).

Mary Douglas and Katherine Bertram were then brought into the courtroom by Detective Zollo "to identify somebody" (W 11, 33-6, 42, 45, 55, 73-5, 77-8, 98-100). The complainants took seats on opposite sides of the courtroom (W 56, 100). They viewed "lots of people" entering the room from a side door but were not aware that these persons were prisoners (W 21, 41, 57, 75-6, 81-2, 107-8, 113). At a prearranged signal between Detective Zollo and Detective Mohan, Mohan brought the appellant into the courtroom (W 11, 19, 24, 35, 48). The complainants were not informed of these plans (W 45, 77). Both ladies identified the appellant (W 35, 57, 82, 102).

Miss Douglas also testified that on August 6, she returned to court and saw the appellant with Detective Zollo (W 104).

Miss Bertram testified that on October 13, 1969, two days before the Wade hearing, she viewed a group of seven photographs in the District Attorney's Office (W 116-18).

B. The Trial

The crimes against Mary Douglas (robbery, grand larceny, burglary and possession of a knife)

Mary Douglas, age twenty-five, testified that she was a 1966 graduate of Northwestern University in Chicago and had been married and divorced while in college. In 1967 Miss Douglas came to New York to attend the Julliard School of Music. Several months after her arrival here, she met one Edward Sukenick and they had been "intimate" (T 110-13).*

Early in the afternoon of July 8, 1968, Miss Douglas visited a gynecologist and learned that she was in her sixth week of pregnancy (T 113-14). At 3:10 p.m. she returned to her apartment building at 2 Horatio Street. A door man was stationed at the lobby entrance door but there was a service entrance on the first floor that was unlocked and unattended (T 114-16). Miss Douglas entered

* References preceded by "T" are to minutes of trial.

through the lobby, picked up her mail and walked across the lobby to her first floor-apartment. She heard footsteps behind her (T 117-18). As she unlocked her door, the footsteps sounded closer to her. Miss Douglas turned around and "there was a young Negro boy coming towards me" and he was holding a knife with a long thin silver blade (T 118-19). Miss Douglas had a clear view of his face; at trial she positively identified the man as appellant David Mitchell (T 140, 151).

Miss Douglas asked Mitchell what he wanted. He grabbed her by the arm, held the knife to her face and shoved her into the apartment (T 119-20, 150). Appellant asked if anyone was at home and Miss Douglas responded "No." But in an attempt to deceive him she told him that she was "expecting someone." Mitchell closed the apartment door and bolted it (T 120).

While holding Miss Douglas' arm, he walked her into the kitchen, bathroom and bedroom (T 121, 152-3). Again she asked him what he wanted and told Mitchell

> "he could have anything he wanted and that I wouldn't give him any trouble if he please would not hurt me and that I didn't want to hurt him."

Mitchell did not answer. Miss Douglas inquired if he wanted money and Mitchell responded "Yes" (T 121, 172). She told him that she had only loose change and traveler's checks and "that I would give those to him." Mitchell then ordered Miss Douglas to take off her clothes and lie down. Miss Douglas refused and said "he could have the money, but I wouldn't do that." Appellant, with the knife in his hand, grabbed her arm and again ordered her to undress. This time she complied and removed all her clothes including her under garments (T 122). Mitchell then pushed her on her back, unzipped his pants fly and took out his penis. He got on top of her and inserted his penis into her vagina. He demanded that Miss Douglas put her arms around him and "he told me to move my hips in a certain way, and he told me to kiss him." Miss Douglas did everything Mitchell told her (T 123-4). Mitchell held the knife on her chest and Miss Douglas was able to see the knife closely -- it had a black handle and there was writing on the blade (T 123, 125, 167-8). At trial Miss Douglas identified People's Exhibit 1 for identification as the knife Mitchell used on the day of the crime. She recognized the handle, the shape of the blade and the engraving on the blade -- "Romo" (T 138-9). Mitchell

remained on top of her for a few minutes and then stood up. Miss Douglas immediately got up and put on her dress without her underwear because "I just wanted to cover my body" (T 125). Mitchell then pointed the knife at her, grabbed her arm and brought Miss Douglas to the bathroom. There he wiped himself with a towel, put his penis in his pants and closed his zipper. Miss Douglas asked him to leave (T 126).

Appellant inquired, "Where's the money?" She answered "Oh, yes, do you want the money? Will you go then if I give you the money?" Mitchell said "yes" he would and told Miss Douglas that she was "a very nice person" (T 127). Miss Douglas removed ten American Express traveler's checks in ten dollar denominations from her desk drawer and he took them from her. He looked them over and ordered her to sign them -- the checks had previously been signed once by Miss Douglas at the time she purchased them (T 127-8). And while he stood along-side of her with the knife, Miss Douglas signed the checks "one by one." After signing the last check, she asked the appellant not to hurt her any more and to please leave (T 129-30). Mitchell picked up the checks and told her again that she was "a very

nice person." Miss Douglas told him "to please never come back," and he left the apartment (T 130).

Miss Douglas testified that Mitchell had remained in her apartment for twenty to twenty-five minutes (T 130, 150, 172). During this period she was able to observe that he had a scar on the right side of his face (T 126, 172) and that he spoke with a "West Indian accent." She was "struck" with the accent "Because I have been to the West Indies." She also testified that Mitchell was wearing dark pants and a blue or green shirt (T 126, 157) and smoked Benson and Hedges cigarettes "before and after" he attacked her (T 136, 157).

When appellant left her apartment Miss Douglas telephoned her boyfriend and tried to tell him what had happened (T 131). She then took a shower and douched (T 131). At 4:00 p.m. her boyfriend arrived and Miss Douglas related the crime to him. He telephoned the police and at 5:00 p.m. the police came to her apartment (T 131-2). On cross-examination Miss Douglas testified that she described appellant to Detective Zollo (T 147-9, 172). She was taken to St. Vincent's Hospital where she was examined. She informed the doctors there of her pregnancy (T 132).

One week later, on July 15, Miss Douglas was returing home and saw Mitchell standing in front of her apartment building. Miss Douglas walked by him, entered the lobby and looked out at him through a lobby window "to seek what he was doing" (T 132-3, 153, 164, 171). Appellant walked to the lobby door and peered into a window (T 153). The uniformed doorman in the lobby asked Miss Douglas if she was being bothered by anyone and Miss Douglas told him that she was going to speak with that person (T 154, 161, 164, 166). Feeling "protected" by the doorman's presence (T 154), Miss Douglas approached Mitchell and asked him what he wanted. Mitchell replied "Let's have a good fuck" (T 134, 156). He told her that if she did not do as he requested he would beat her up and "if he didn't get me he would send his friends down and they would" (T 134). He asked Miss Douglas for money and told her that he was angry because he was unable to cash the traveler's checks. He accused her of "trying to get him into trouble" (T 135). Mitchell then took out his wallet and showed her a picture of his little girl. He again asked Miss Douglas for money and she gave him five dollars. Appellant walked away; Douglas promptly called the police (T 135-6).

She then moved out of her apartment and went to live with Edward Sukenick on West 15th Street. Later in the month, Miss Douglas accompanied by Mr. Sukenick went to Puerto Rico where she had an abortion (T 137, 158, 173).

Miss Douglas also testified that she reported the theft of her traveler's checks to the American Express Company and received a one-hundred dollar refund (T 145-6, 169).

The crimes against Katherine Bertram
(robbery, grand larceny and burglary)

On July 9, at about 2:45 p.m., Katherine Bertram, an art teacher on summer vacation, returned to her apartment building at 137 West 12th Street. She opened the outer entrance door, used her key to open the inner lobby door and walked straight to the elevator. The inner door closed automatically behind her but Miss Bertram did not hear it slam shut (T 180, 184-5, 233, 260-1). She pressed the elevator button and while waiting for the elevator to descend she turned to her right and looked in the direction of the building entrance. The lobby had lights and Miss Bertram saw a Negro man, who was smoking a cigarette,

enter the building's outer door and proceed to enter the lobby by the inner door, but Miss Bertram paid no particular attention to him (T 186-7, 194, 234, 260-2).

The elevator arrived, Miss Bertram entered it and the Negro man followed her, the elevator door closing behind him (T 188). As she pressed the elevator button for her sixth floor apartment the man suddenly pulled out a knife with a five - or six-inch silver blade, "put it towards me and didn't say anything until perhaps the fourth floor, and he said, 'Who else lives on your floor?'" and who lives in your apartment (T 189, 191, 241-2). She did not see the handle of the knife, the man's hand covered it. At trial Miss Bertram testified that the knife introduced as People's Exhibit 1 for identification "looks like the knife" the appellant used (T 214-16).

The elevator stopped at the sixth floor and the door opened. The man pulled up Miss Bertram's blouse and put the knife against her side. He then pulled the blouse down over the knife an pushed her out of the elevator (T 191). With the knife still pressed against her abdomen, Miss Bertram went to her apartment door located adjacent to the elevator and started to unlock it. The man repeatedly

asked her if anyone was at home (T 191-2). They entered the apartment together and the man, while still holding the knife against her, led her through the three-room apartment to determine if anyone else was there (T 192). The man then took her back to the first room they had entered -- a bedroom-living room (T 192-3). Miss Bertram testified that her apartment was illuminated by sunlight. At trial she positively identified the man as defendant Mitchell (T 216-18). He was "wearing a striped knit shirt * * * orange and beige stripes, very wide [Exh. 10], and dark flannel trousers" (T 19-, 209-10, 327). Mitchell held the knife to her abdomen and ordered, "take off your clothes." Miss Bertram undressed (T 193). He then threw his Benson and Hedges cigarette butt on the floor and stamped it out (T 194-5). After unzipping his fly and taking his penis out of his pants, he placed the knife against her back and stuck his penis in Miss Bertram's mouth. He commanded "Suck on me," and she complied (T 195-7). Mitchell removed his penis from her mouth and moved the knife down to Miss Bertram's shoulder, forcing her to fall back onto the bed (T 198). Mitchell next placed the knife blade against her vagina and queried "Are you clean?" Miss Bertram replied "yes" (T 199). Appellant then placed

the knife on the left side of her head and "came down on top of me, and put his penis in my vagina * * *" (T 199). Mitchell told her "to whine" and Miss Bertram "whined." Miss Bertram was scared and grabbed appellant's hair. He yelled "Don't touch my hair" (T 200). While Mitchell remained on top of her Miss Bertram observed that he had a scar on his temple (T 200-1). She also observed on appellant's left hand a gold wedding ring with three "angularly" cut diamonds across its front (T 201, 205, 244-5). And at trial Miss Bertram left the witness stand, approached the defense table and stated that the ring defendant was then wearing on his right hand "is the same ring he was wearing on his left hand" on July 9 (T 204-5).

Mitchell got off her. Miss Bertram's vagina "felt raw" (T 214). She started to dress but as she was putting on her blouse appellant grabbed it from her and said "Clean me off." She used the blouse to wipe him (T 210). Mitchell put his penis in his pants and zipped up his fly. He would not let her get dressed (T 211). He looked around the room and asked Miss Bertram if he could have anthing (T 210-11). She pointed to a shelf with books, cameras, and "other things" and told Mitchell to take what he wanted.

appellant picked up a combination locked metal box and asked if Miss Bertram knew its combination. She said "no" -- it belonged to Steve Zina, a young man she had been living with for approximately one week (T 182-3, 212, 230-1). Mitchell then took the binoculars off the shelf. He asked for money and Miss Bertram gave him five dollars from her pocket book (T 212-13, 245).

While she was still undressed Mitchell shoved her into the hall and entered the elevator. She ran back to her apartment, locking the door behind her. She promptly showered and douched and telephoned the police (T 213-14). Mitchell had remained in the apartment fifteen or twenty minutes (T 232-3).

About one hour later, Detective John Stratford arrived at her apartment. She gave Stratford the Benson and Hedges cigarette but Mitchell had cruised on the floor (T 214, 244). On cross-examination, Miss Bertram testified that she described Mitchell to Stratford as a Negro, in his twenties, about five feet eight inches tall, weighing one hundred and fifty pounds (T 236, 238, 246-7). She told Stratford that Mitchell had "a scar around the curve of his body" but explained that when she spoke to the detective

"I could not remember where the scar was" (258-9, 264). Miss Bertram also told Stratford that her attacker wore dark flannel pants and a "mustard yellow" knit shirt (T 246-7). She explained at trial, however, that the shirt was actually a beige color and she did not specify its "exact technical color" to Stratford because she was "slightly hysterical" at that time and she believed that "mustard yellow" would be the best description for Stratford since he was inexperienced in the Munsel color system (T 247, 250-1. 265-73). Miss Bertram was taken to St. Vincent's Hospital for an examination (T 216).

Appellant's wife, Dorothy Mitchell, confirms the identifications by Douglas and Bertram

Dorothy Mitchell voluntarily appeared and testified* that she was married to the appellant David Mitchell for two and one-half years (T 318, 329, 333, 338). During the period of July 1968, her husband smoked only one brand of cigarettes -- Benson and Hedges 100's (T 320).

Appellant had purchased a gold wedding ring with three diamonds at Busch jewelers. He wore the ring interchangeably on either his left or right hand (T 320-1, 337-8).

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* Before Mrs. Mitchell testified, a voir dire held to determine if her testimony would be violative of the husband-wife privilege (T 274-318).

In July 1968, appellant had a scar on his right cheek and spoke with a "slight" West Indian accent (T 328-9).

Mrs. Mitchell testified that she does not have any children (T 327) but appellant had children (T 327-8).

During July 1968, appellant wore a beige knit shirt inside and outside of their house. It was the only colored knit shirt he possessed. While in prison awaiting trial appellant gave her the shirt to wear and she voluntarily brought it to the District Attorney's Office. At trial she positively identified the beige knit shirt, People's Exhibit 10, as the shirt her husband had worn in July 1968 (T 326-7, 337-40; Exh. 10).

Mrs. Mitchell testified that appellant discussed where he was employed and his hours of work in the presence of others. He worked at the Drake's Bakery from 4 p.m. to 1 a.m., but "sometimes" he would work from 10 p.m. to 6 a.m. In June and July 1968 on several Mondays appellant worked the latter hours. When appellant began work at 4 p.m. he would often go to the Seaman's Union Hall at Seventh Avenue between 12th and 13th Streets in Manhattan. Mrs. Mitchell testified that appellant could have gone to the Seaman's

Hall any day of the week but went there mostly on Thursdays (T 322, 324-7, 341-5).

Mrs. Mitchell also testified that she visited her husband more than thirty times while he was in prison awaiting trial and often gave him money (T 329, 335-6). On cross-examination she testified that she was uncertain if she would divorce her husband (T 338).

The crime against Laura Gleason (criminal trespass)

At about 1:30 p.m. on July 22, Laura Gleason returned from Hunter College to her second floor walk-up apartment at 157 Christopher Street. The street entrance door remained locked at all times and visitors were admitted into the building by ringing a buzzer in Miss Gleason's apartment (Gleason, T. 350, 353-4; 380-3, 409). There was an accountant's office directly below Miss Gleason's apartment; Edward Murphy and one Jimenez lived in the apartment on the third floor (Gleason, T 353; Murphy, T 440, 443-4).

Miss Gleason had started to study when at 1:55 p.m. the street door buzzer sounded. Miss Gleason first thought it was Steven Mittenthal, the man she had been living with in New York City for two years (Gleason, T 350, 357-8, 380, 408-9; Mittenthal, T 419-21). But Mittenthal was not expected home at the time, in any event he had a key, and Miss Gleason figured it could not be anyone else she knew (Gleason, T 358). The buzzer continued to ring and Miss Gleason went to her front bedroom window which overlooks Christopher Street to try to determine who was ringing. The individual was apparently standing against the door and Miss Gleason could not see anyone (Gleason, T 355-6, 359, 398). She then went to her apartment door, opened it partially and pressed the buzzer in her apartment (Gleason, T 359, 396). Her apartment door was very old and constructed of very thin wood. There was a lock on the door knob but merely closing the door did not activate the lock (Gleason, T 306).

A man entered the hallway and walked to the first or second step on the staircase. Miss Gleason was only able to see an outline of the man because the entranceway was poorly lighted. Miss Gleason asked him what he wanted.

The man said "Is there a Kenny * * * living here?" The man took out a piece of paper, glanced at it and then looked up at Miss Gleason. He asked "I was told to look this person up if I was in New York; a seaman gave me this address to look up" (Gleason, T 354, 360-2, 394, 400). Miss Gleason informed the man that no such person lived in her apartment and she slowly closed her door. The man, however, leaped up the stairs. Miss Gleason slammed the door but could not lock it; the door was out of line with the lock and the lock would not catch (Gleason, T 362-5, 400). The man burst through the door, flinging Miss Gleason against the wall.

Miss Gleason ran in the direction of her bedroom and the man followed, pulling on her shirt and touching her breasts and thighs. He was also trying to pull off her "wrap-around" shirt (Gleason, T 365-6, 402-4, 410, 417-18). Miss Gleason, with the build of an athlete -- she did exercises and swam a great deal -- wrestled with her attacker. She observed a long jagged scar on the right side of his face and saw that he was wearing a green banlon shirt (Gleason, T 363, 367, 402). At trial Miss Gleason positively identified her attacker as appellant Mitchell (Gleason, T. 372). Miss Gleason screamed as she struggled with the

appellant and she eventually reached the bedroom window. Half of her body was out the window and she continued to scream (Gleason, T. 367, 369, 401; Murphy, T 445). Mitchell ran from the bedroom (Gleason, T 369).

Edward Murphy, who had prior convictions for possession of a weapon, robbery and extortion, was sleeping at 2:00 p.m. in his upstairs apartment -- he was a banquet manager and worked evenings -- when his friend Jiminez woke him. Murphy heard screams that he recognized as Miss Gleason's (Murphy, T 440-5, 455-7, 468). Dressed only in his under shorts, Murphy ran to his apartment door and opened it. He saw a man dressed in green banlon shirt standing outside his door "trying to get up a fire escape ladder." The area outside Murphy's door was illuminated by a skylight and a fluorescent lamp. Murphy looked directly at him for five seconds and was able to get a clear view of his face (Murphy, T 445-6, 468-9, 470, 473). At trial Murphy testified that he was positive that the man was appellant Mitchell (Murphy, T 446). Murphy said "What the hell are you doing in the hall." Appellant did not answer but turned and ran down the stairs. Murphy chased the appellant; caught up with him and hit him behind his neck

(Murphy, T 447-8, 453, 468, 474-5). Appellant was knocked against the wall and fell alongside the banister, turning around as he fell. Again Murphy was able to get a clear view of his face (Murphy, T 448-9, 471, 473).

Murphy called to Jiminez to bring him his pants and while Murphy put them on, Mitchell got up and ran downstairs. When Mitchell reached the street door he walked out "like he belonged" in the building. Murphy lost sight of him (Murphy, T 449, 461, 471-3). Murphy finished putting on his pants and ran to the street. He saw Mitchell walking casually about fifty-five feet away in a crowd that had gathered on Christopher Street (Murphy, T 458-9; Gleason, T 369, 393). The people in the crowd spread out and turned to look at Mitchell as he walked by them. Murphy moved into the crowd and grabbed the appellant (Gleason, T 370). Murphy saw Miss Gleason screaming from her window. Mitchell tried to break away but Murphy brought him back to the doorway (Murphy, T. 450-2, 460, 462-7; Gleason, T 390-3). Mitchell placed his hands in his pockets and Murphy said "Don't put your hand in your pockets" (Murphy, T 452, 465). Mitchell then attempted to show Murphy some papers and told Murphy he was a "merchant seaman or something" but Murphy

did not understand it "because of his accent" (Murphy, T 452, 463, 465). Murphy then escorted the appellant to Miss Gleason's apartment and Miss Gleason was positive that he was the same man who only moments before was in her bedroom (Murphy, T 453; Gleason, T 372).

Detective James P. Mohan, while in a patrol car, turned onto Christopher Street and saw a small crowd congregated in front of 157 Christopher Street (Mohan, T 477-80). After conversing with a pedestrian, he entered the building. In the second-floor apartment he saw the appellant, Edward Murphy, Laura Gleason, two patrolmen and one Anna Gonzalez, who worked in the accounting office downstairs (Mohan, T 480-1, 495-6; Gleason, T 416; Murphy, T 454). Mohan spoke with Miss Gleason and observed that her "eyes were red, that her hair was mussed and her clothing was in disarray." She had a cut on her hand and dust smudges on her legs (Mohan, T 482-3, 487, 501-2). He then walked to the apartment door and noticed that the hasp on the door was bent and splinters of wood were on the floor (Mohan, T 481-2, 503-4, 506; Gleason, T 376-7, 389-90; Mittenthal, T 421-2; Murphy, T 453-4).

Mohan searched appellant and found a seaman's card in his pocket (Mohan, T 483). Mohan testified that the Seaman's Union Hall was located near Miss Gleason's apartment and that they had a "shape up" daily at 11 a.m. and 1:00 p.m. (Mohan, T 483-4).

Later, Mohan took Mitchell to be photographed. Mohan testified that appellant's photograph [Exh. 23], which revealed a scar on the right side of his face, was a true and accurate representation of his face on July 22 (Mohan, T 484-6, 488-9, 492).

Eight or nine months after the crime, in March or April of 1969, Steven Mittenthal was cleaning the apartment he shares with Miss Gleason. There was a gold chair located near the apartment door -- the chair had been in the same position on the date of the crime (Mittenthal, T 422-3, 427-8; Gleason, T 355). Mittenthal removed the cushion of the chair and observed a knife, near the back of the chair (Mittenthal, T 427-8). The knife was closed and had a black plastic handle. It was a switch blade but "the button did not work" (Mittehthal, T 429). Mittenthal opened the knife and observed that it had a thin blade. The blade was engraved with "R.O.M. something" (Mittenthal T 429-30).

Mittenthal testified that though he had kitchen knives in his apartment, he did not have a folding knife like the one he found and he never saw anyone bring such a knife into the apartment (Mittenthal, T 426-7).

Mittenthal placed the knife in a basket on a little table and just before the summer of 1969, he showed it to Miss Gleason (Mittenthal, T 431-2; Gleason, 373-4). He then loaned it to his friend Ron Brawer for carving art work. Brawer returned it to him "about a week ago" (Mittenthal, T 432, 434-5); At trial, he testified that People's Exhibit 1 for identification was the knife he had found in the apartment (Mittenthal, T 433-4).

This knife was not permitted into evidence by the trial judge.

C. The Actions of the Appellant at Trial

After the Wade hearing had concluded and the selection of the jury for trial had commenced, appellant's assigned counsel, Emanuel Molofsky, Esq., told the court that Mitchell wanted to discharge him. Mr. Molofsky explained that Mitchell was angry at him because he did not take an immediate appeal from the trial court's denial

of certain pre-trial discovery, although Molofsky had informed Mitchell that the challenge to the court's denial of relief was only cognizable on appeal from the judgment. Mr. Molofsky added that appellant also "discharged me, feeling I was in conjunction with the District Attorney, that I was against him, and the world was against him." Mr. Molofsky, however, assured the court that he was "ready, willing and able to try this case" (T 25). Mitchell told the court that he wanted the motion appealed immediately and "if this motion cannot be appealed, I would like Mr. Molofsky to withdraw from my case" (T 26). The court advised Mitchell of his constitutional right to represent himself; his right to retain another attorney if he had sufficient funds to do so; and his right as an indigent to assigned counsel (T 26-7, 38). Mitchell however, refused to waive his right to counsel. The court then informed Mitchell that "Mr. Molofsky is assigned -- period" (T 27).

Mitchell then threatened "I am going to say in front of the jurors that I do not want Mr. Molofsky to represent me" (T 31). And despite the court's repeated warnings that if he did not refrain from such outbursts

in front of the jury "I am going to bind and gag you" (T 32, 39-41), Mitchell continually interrupted the proceedings (T 32, 38-41). Mitchell was then placed in a straight jacket and gagged (T 42), to preserve the dignity of the court and to prevent any further disruption of the proceedings. The court told Mitchell that the bind and gag would be removed when he promised to refrain from further outbursts (T 45-6).

The selection of the jury continued and appellant indicated to the court through Mr. Molofsky that he would "persist in his prior disruptive conduct" (T 50). The court, however, gave Mitchell the opportunity to speak. At this time Mitchell told the court that he wanted Mr. Molofsky "withdrawn" because he "don't known that much about the case"; he did not provide him with minutes of the proceeding; and "if I am convicted I am going to earn up to 87 years, not Mr. Molofsky" (T 51-5). Mitchell again threatened to continue his outbursts in front of the jury (T 56-7).

After seven jurors were sworn, Mitchell apparently agreed to refrain from disrupting the proceedings and he appeared in court without the bindings and gag. The court admonished the jury panel:

> "* * * the fact that the defendant has appeared before you bound and gagged should not in any manner, shape or form, prejudice you against the defendant, nor is it any indication that the allegations contained against him in the indictment are true" (T 58-9).

Prior Proceedings

A. State

The Appellate Division, First Department affirmed the conviction of the appellant without opinion (36 A D 2d 690). Leave to appeal to the Court of Appeals was denied. It should be noted that the appellant in his brief on appeal to the Appellate Division, written by assigned counsel, did not attack the adequacy of his trial attorney, Emanuel Molofsky, but rather argued that the trial court erred in assigning Molofsky again to represent him after the appellant had discharged him.

B. Federal

In 1971, appellant filed a pro se application for a writ of habeas corpus in the Southern District. In an order dated July 15, 1971, Judge Thomas Croake dismissed the application. Appellant had argued, inter alia, that his constitutional rights had been violated by the reassignment of counsel after having been discharged.

This Court affirmed Judge Croake's decision in January 1973, and certiorari was denied in May 1973.

Proceedings In District Court

In November, 1973, the appellant filed a second pro se application for federal habeas corpus relief alleging that his Sixth Amendment right to counsel was violated because of ineffective and inadequate representation by court-appointed counsel, his Eighth Amendment right to be free from cruel and unusual punishment was violated because his sentence was in the aggregate life imprisonment and his Fourteenth Amendment rights to due process and equal protection were denied because of judicial despotism.

In a memorandum dated January 13, 1976, Judge Stewart dismissed appellant's Eighth Amendment claims for failure to exhaust state remedies as required by 28 U.S.C. § 2254 and found no merit in appellant's claim that the trial judge was prejudiced and despotic. However, the appellant asserted that his trial counsel "never did adequately prepare a proper defense in his failure to contact relevant material witnesses whose names were given to him to testify on my behalf." Judge Stewart reviewed the

trial minutes and concluded that Mr. Molofsky was actively engaged in the defense of his client during trial but ordered an evidentiary hearing to determine whether, if witnesses were available, Mitchell might have had a substantial defense not raised at trial.

This hearing was held on April 21, 1976 where both Mr. Molofsky and the appellant testified. Mr. Molofsky testified that he is now the victim of a serious illness (H 11),* that since he defended the appellant in 1969 he has been involved in numerous other trials (H 12) and that as a general practice, in defending a client, he would attempt to locate witnesses if he were aware of their existence (H 13). The appellant testified that he only met Mr. Molofsky twice before trial and that they did not discuss the case. The appellant further testified that on the date prior to his arrest, he had met a friend, one Kenny Burrell, who invited him to pick up some marijuana the following day at 157 Christopher Street, the building where Laura Gleason lived (H 20-23). This witness Burrell was not present on the following day at that address when the incident occurred between Miss Gleason and the appellant. The appellant did not mention this witness until "during the trial" (H 73).

* References preceded by H are to minutes of the evidentiary hearing.

The District Court issued its decision on June 23, 1976. The District Court denied the Attorney General's argument that the appellant had not met his burden of establishing that he had not abused the writ by deliberately withholding his claim of ineffective representation in his earlier petition in that "it would not be in the interest of justice to deny petitioner's application on the grounds that he had raised related claims earlier."

On the issue of inadequacy of counsel, Judge Stewart found that Mitchell's testimony about the lack of communication was supported by the trial transcript and that the trial court had asked no questions about Mitchell's dissatisfaction with Molofsky but just gave him the choice to proceed pro se or with Mr. Molofsky. The trial court made no inquiry about Molofsky's preparation or the validity of Mitchell's objections. Judge Stewart found that Mr Molofsky did not have great familiarity with the details of the appellant's case, made no opening statement and called no witnesses. The opinion stated that the trial transcript corroborated appellant's testimony that he wanted to offer the existence of Kenny Burrell as justification

for his appearance at 157 Christopher Street on July 22, 1968. Judge Stewart found that Molofsky failed to prepare Mitchell's case for trial and therefore provided inadequate assistance of counsel. However, this incompetence did not have the effect of blotting out a substantial defense. The prosecution had much evidence before the jury to connect the appellant with the crimes against Mary Douglas and Katherine Bertram. Mitchell could offer no substantial defense to these crimes. He had no recollection of the dates in question and was not aware of any witnesses who could offer favorable testimony for him (H 68-69).

Judge Stewart dismissed the writ but vacated the appellant's conviction for criminal trespass relating to the incident with Laura Gleason.

POINT I

APPELLANT HAS FAILED TO EXHAUST THE CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE HIS ATTORNEY FAILED TO CONTACT MATERIAL WITNESSES WHOSE NAMES WERE GIVEN TO THE ATTORNEY

Appellant's claim of inadequate representation is based on the contention that he trial counsel failed to

contact for their testimony on appellant's behalf, material witnesses whose names were given to the attorney. The claim has not been exhausted in the state courts.*

As this Court noted in its opinion of January 13, 1976 appellant's state appellate brief did raise the claim of inadequate representation on the issue that the trial court erred in assigning the same lawyer that the appellant discharged. It is clear that the claim was made on different grounds than those presented to this Court. There is no mention at all of a failure by counsel to contact or call material witnesses for the appellant.

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* The affidavit of the first Assistant Attorney General who handled this case, dated December, 1973, appears to have conceded that the inadequate counsel claim was exhausted. That Assistant Attorney General was in error. It is well-established that failure to exhaust is an issue which can be raised at any stage of the proceeding. United States ex rel. Johnson v. Vincent, 507 F. 2d 1309, 1311-1312 (2d Cir.), cert. den. 420 U.S. 994 (1974); United States ex rel. Wissenfeld v. Wilkins, 281 F. 2d 707, 710 (2d Cir. 1960). Cf. United States ex rel. Sostre v. Festa, 513 F. 2d 1313 n. 1, 1319-1320 (2d Cir. 1975), cert. den. ___ U.S. ___ (1976).

It is by now well-established that the exhaustion requirement of 28 U.S.C. § 2254 requires that "the substance of a federal habeas corpus claim must first be presented to the state courts." Picard v. Connor, 404 U.S. 270, 278 (1971). The test of Picard is whether or not the state courts have had the first and fair opportunity to consider the same grounds. Id. at 275-276; United States ex rel. Gibbs v. Zelker, 496 F. 2d 991 (2d Cir. 1974); United States ex rel. Nelson v. Zelker, 465 F. 2d 1121, 1124 (2d Cir.), cert. den. 409 U.S. 1045 (1972).

The New York courts have certainly never had a fair opportunity to consider the claim of inadequacy of counsel because of a failure to contact or call material witnesses; indeed they have had no opportunity at all since this contention was never made at all in the appellate brief. Moreover, the exhaustion requirement is not met if appellant makes the same general claim in both state and federal courts but presents the federal courts with new factual allegations not used to support the claim in the state courts. E.g. United States ex rel. Cleveland v. Casscles, 479 F. 2d 15, 19-20 (2d Cir. 1973); United States ex rel. Figueroa v. McMann, 411 F. 2d 915 (2d Cir. 1969); United States ex rel. Boodie v. Herold, 349 F. Supp. 372 (2d Cir. 1965);

United States ex rel. Kessler v. Fay, 232 F. Supp. 139, 142 (S.D.N.Y. 1964).

Finally, respondent disagrees with the proposition that the claim of inadequacy of counsel was sufficiently before the state court, even as general proposition. Appellant subsumed the argument under a heading challenging the discretion of the trial court to reassign counsel who had been discharged by appellant. Other supporting arguments were made under the heading.

A fair opportunity for state court consideration means more than a bare raising of the issue itself. The exhaustion requirement is not met when the state court claim was based on different constitutional grounds than those asserted to the federal court (Picard v. Connor, supra) or when the claim was asserted to the state court on non-constitutional grounds. United States ex rel. Nelson v. Zelker, supra. As in the Nelson case, the general constitutional claim now propounded by appellant was raised in the state courts not on constitutional grounds but couched under the heading of abuse of discretion by the trial court. Appellant has an available state remedy under which he can pursue his claim. N.Y. Crim. Proc. Law § 440.10(h).

POINT II

AT THE EVIDENTIARY HEARING THE APPELLANT HAD THE BURDEN OF PROVING THAT HE DID NOT DELIBERATELY WITHHOLD THIS GROUND FOR RELIEF IN HIS PRIOR FEDERAL HABEAS CORPUS PROCEEDING. HE DID NOT MEET THIS BURDEN.

In 1971 the appellant initiated a habeas corpus proceeding in this Court. United States ex rel. Mitchell v. Conboy, 71 Civ. 2324. The petition was denied by Judge Croake on July 15, 1971. Although appellant claimed that his trial counsel lacked interest in his case and inadequately prepared his case for trial (Petition at 8-9), he never claim that the attorney failed to contact or call witnesses on his behalf.

Section 2244 of Title 28, U.S.C. provides that on a subsequent application for habeas corpus relief, the petition need not be entertained unless a new ground is asserted and unless the court "is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

The purpose of the rule is to avoid piecemeal litigation of a appellant's claim and to protect the courts from those who would hold claims in reserve in order to bring successive petitions. E.g. Sanders v. United States, 373 U.S. 1, 17-18 (1963); United States ex rel. Townsend v. Twomey, 452 F. 2d 350, 357 (7th Cir.) cert. den. 409 U.S. 854 (1972); Johnson v. Coppinger, 420 F. 2d 395, 399 (4th Cir. 1969).

One who seeks relief through the federal courts should include every conceivable allegation in his first petition. United States ex rel. Bruno v. Reimer, 103 F. 2d 341, 342 (1939); Holland v. Coiner, 293 F. Supp. 203 (N.D.W. Va. 1968). See Fulford v. Smith, 432 F. 2d 1225 (5th Cir. 1970); Vera v. Beto, 332 F. Supp. 1197, 1199 (S.D. Tex. 1971). A prisoner who has on a prior application

> ". . .deliberately withheld a ground or relief need not be heard if he asserts that ground in a successive motion; his action is inequitable - an abuse of the remedy - and the court may in its discretion deny him a hearing." Sanders v. United States, 373 U.S. at 10. See also id. at 18.

At the evidentiary hearing the burden was on the appellant to demonstrate that he had not abused the writ by previously

withholding his claim. Price v. Johnston, 334 U.S. 266, 292 (1948); Johnson v. Coppinger, supra, 420 F. 2d at 399.

Mitchell was well aware that this claim of the missing witness was a possible argument to a court since he mentioned this claim prior to trial in a pro se motion to a Queens County judge (H 85-87). Yet he does not bring it to the attention of his attorney until the trial had begun, he does not mention it on appeal to the state courts and does not bring it specifically to the attention of Judge Croake. Appellant is attempting to engage in piecemeal litigation.

POINT III

APPELLANT HAS NOT MET THIS COURT'S STANDING FOR SHOWING INADEQUACY OF COUNSEL

Petitioner carries a heavy burden of showing that his representation was "so woefully inadequate as to shock the conscience of the court and make the proceedings a farce and mockery of justice". This Court continues to adhere to this standard. United States v. Yanishefsky, 500 F. 2d 1327 (2d Cir. 1974); United States ex rel King v. Schubin, 522 F. 2d 527 (2d Cir., 1975) cert. den. ___ U.S. ___ (1976);

United States ex rel. Testamark v. Vincent, 496 F. 2d 641 (2d Cir., 1974) cert. den. 95 S. Co. 1685 (1975); United States ex rel. Jones v. Vincent, 491 F. 2d 1275 (2d Cir., 1974) cert. den. 419 U.S. 877. Appellant has not met his burden.

The District Court opinion of January 13, 1976, at pages 4 and 5, clearly shows that Mr. Molofsky, the trial defense attorney, was "actively engaged in the defense of his client during the course of the trial". He sought suppression of the in-court identifications by the two complaining witnesses at the Wade Hearing held prior to trial (W. 119-123); he cross-examined all the witnesses with a view to showing possible mistaken identification (T 146, 172, 215, 397, 467); on several occasions, he sought to sever the three different criminal transactions charged in the indictment (T 4-5, 76, 311); he represented to the trial court appellant's desire to have new counsel appointed (T 25-27); he objected on numerous occasions to allegedly prejudicial and inflammatory statements by the prosecutor (T 76, 197); argued for dismissal of the indictment at the end of the people's case (T 508); obtained inclusion in the trial courts charge that the fact that defendant did not take the stand could not be considered by the jury (T 691); and moved for a mistrial and the setting aside of the verdict after conviction (Sentencing Minutes - p. 2).

Appellant's argument that trial counsel did not adequately prepare a proper defense in that he did not contact relevant material witnesses (emphasis added) becomes frivolous, subsequent to the hearing, when it becomes clear that the relevant material witnesses the appellant wished his counsel to interview is one witness who was not even present on the date of the indictment with Laura Gleason. Appellant did not inform his attorney of the witness until "during the trial" (H 73). He did not present this matter to the trial judge when given an opportunity to discuss with the trial court his differences with Mr. Molofsky (T 50). The appellant admitted to the trial judge that his counsel was a "capable attorney" (T 40) but did not feel safe with him (T 53) although admitting that he might be wrong in his judgment of Mr. Molofsky (T 52). Appellant was vague in his reasons for requesting another attorney. The appellant had already had three previous lawyers (H 43-56). The trial court was not placed on notice that there was anything substantially wrong with Mr. Molofsky representing the appellant. The trial judge need not appoint other counsel unless good cause is shown. United States ex rel. Jackson v. Follette, 425 F. 2d 257 (2d Cir. 1970); United States v. Gutterman, 147 F. 2d 540, 542 (2d Cir. 1945).

Appellant argues though that had Burrell been located, there may have been established a relationship between Burrell and Gleason which would have effected Laura Gleason's credibility. Appellant in his brief at p. 29 enters into pure speculation that Gleason embellished her story with a sexual attack to distract the police from the fact that marijuana was stashed in her apartment. There is no basis at all in the record for this theory. It should be noted that the witness Gleason screamed out of her window (T 367, 369, 401, 445), thereby attracting attention to herself and her apartment.

In ligth of the strength of the prosecution's case, the trial attorney employed reasonable strategy in presenting the defense of his client. Given this kind of case there is "not too much the best defense attorney can do." United States v. Katz, 425 F. 2d 928, 930 (2d Cir. 1970). Ultimately, as a practical matter, counsel could best serve his client by cross-examining the prosecution witnesses to create reasonable doubt concerning their credibility and the strength of their identification of the appellant. This is what Mr. Molofsky did. There is little to do in this type of case in the way of preparation other than to familiarize himself with the facts of the case. The number

of times counsel meets with his client does not create a sufficient basis to set aside a conviction. Chambers v. Monroney, 399 U.S. 42 (1970).

Appellant argues that the procedures used by the police in obtaining an identification of the appellant were unconstitutionally suggestive and that this should have been argued by the counsel to the jury. Appellant further suggests that trial counsel should have developed expert psychological testimony concerning the facts of the suggestive identification (Appellant's Brief - p. 26).

On the prior habeas corpus proceeding, Judge Croake found that the methods used were constitutionally valid (Decision, July 15, 1971). Judge Stewart, in his decision of January 13, 1976 stated that Molofsky cross-examined all the prosecution's witnesses, attempting to impeach their testimony and to argue that their identification of Mitchell was mistaken. Molofsky continued his misidentification strategy in his summation (T 525-527, 529-539, 543-544). In fact, Mr. Molofsky's entire stategy was misidentification. There was certainly no "total failure to present the cause of the accused in any fundamental respect." United States v. Garguilo, 324 F. 2d 795, 796 (2d Cir. 1963).

Assuming arguendo, that Mr. Molofsky was inadequate in his preparation, the appellant still has not met the standard in this Circuit. As this Court said in United States ex rel. Maselli v. Reincke, 383 F. 2d 129, 133, n. 4 (2d Cir. 1967):

> "[A] defendant's constitutional right to fundamental fairness is not violated when, looking back upon the events occurring at a trial, one can perceive ways in which the trial representation could have been bettered and some errors or mistakes avoided. Fundamental fairness is denied only in extreme situations and then only when the defendant is obviously prejudiced thereby." (Emphasis added).

The appellant could not have been prejudiced in relation to the crimes against Mary Douglas and Katherine Bertram. There was no substantial defense to these crimes to be blotted out.

Appellant contends that he was ill-advised not to take the witness stand by his trial attorney and that the court participated in this error. Mr. Molofsky, obviously aware that he was dealing with a dissatisfied client, examined Mitchell on the record as to whether or not he wanted to testify in his own behalf. At the time of this trial, the appellant could be cross-examined as to any immoral, vicious or criminal act that he may have committed provided

that the prosecutor had a good faith basis to ask the question. The prosecutor need not reveal the extent of his ammunition for cross-examination prior to the defendant's taking the stand. People v. Sorge, 301 N.Y. 198; People v. Webster, 139 N.Y. 73. Mr. Molofsky had already made a motion to bar cross-examination on the appellant's prior conviction. The trial court denied this motion in a proper use of its discretion. There are other reasons, besides prior immoral, vicious or criminal acts, that would necessitate a defense attorney advising his client not to take the stand. An attorney should consider how his client would stand-up under cross-examination on the facts of the case itself. In light of appellant's testimony at the evidentiary hearing, his decision not to take the witness stand was probably wise in relation to trial strategy. Appellant's contention is without merit.

The appellant also argues that the trial court was under an obligation to split the charges in the indictment. The court was under no such obligation. People v. McEnery, 22 N Y 2d 942 (1968); People v. Lombardi, 20 N Y 2d 266; People v. Cooper, 26 N Y 2d 833 (1970).

Appellant also argues that the court erred in permitting testimony on a knife that was not permitted into evidence. This is clearly frivolous since the appellant could have been convicted of the weapon charge on the testimony of Douglas and Bertram alone. The jury found both these ladies to be credible. Exclusion of the knife from evidence aided the appellant at trial but the court could not exclude the testimony of the witnesses concerning appellant's use of the knife.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
September 23, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellant

SAMUEL A. HIRSHOWITZ
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Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MAGDALINE SWEENEY , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 23rd day of September , 1976 , s he served the annexed upon the following named person :

LAWRENCE STERN, ESQ.
Attorney for Petitioner-Appellant
11 Monroe Place
Brooklyn, New York

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Magdaline Sweeney

Sworn to before me this
23rd day of September , 1976

Assistant Attorney General
of the State of New York